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January 30,2004

By Hand Delivery

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal
Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Clear and Conspicuous Proposals (Docket Nos. R-1167, R-1168, and R-1169)

Dear Ms. Johnson:

This comment letter is submitted on behalf of Visa U.S.A. Inc. in response to the proposed revisions by the Board of Governors of the Federal Reserve System ("FRB") to the "clear and conspicuous" disclosure standards for Regulations B, E, M, Z and DD ("Proposed Rules"). Visa appreciates the opportunity to comment on this very important issue.

The Visa Payment System, of which Visa U.S.A.' is a part, is the largest consumer payment system, and the leading consumer e-commerce payment system, in the world, with more volume than all other major payment cards combined. Visa plays a pivotal role in advancing new payment products and technologies, including technology initiatives for protecting personal information and preventing identity theft and other fraud, for the benefit of its member financial institutions and their hundreds of millions of cardholders.

The FRB has solicited comment on the Proposed Rules to define more specifically the standard for providing "clear and conspicuous" disclosures and to provide a more uniform standard among tlie FRB's consumer protection regulations. Visa's comments focus on proposed amendments to Regulations B, E, and Z ("Regulations"). Additionally, Visa is providing comments concerning the FRB's request for information regarding debt cancellation contracts and debt suspension agreements under Regulation Z.

I. Clear and Conspicuous Proposals

Visa appreciates the FRB's goal of seeking to establish a more uniform standard for providing required disclosures. It is important to Visa that consumers understand the disclosures and the terms of their agreements and Visa recognizes the need to present information in a

[1] Visa U.S.A. is a membership organization comprised of U.S financial institutions licensed to use the Visa service marks in connection with payment systems.

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meaningful, clear manner. However, Visa strongly opposes the adoption of the Proposed Rules as the way to achieve those goals. It is unclear what specific problems the FRB has identified and intends to fix through adoption of the "clear and conspicuous'' standards, but whatever those problems may be, the proposed "one-size-fits-all" approach fails to provide the flexibility needed to address the variety and complexity of disclosures required under the Regulations. Furthermore. the proposed "clear and conspicuous'' standard will impose significant costs, will create considerable civil liability risks for financial institutions, and may actually lead to less consumer understanding of the terms of their accounts. Accordingly, Visa urges the FRB to withdraw the Proposed Rules. If the FRB nevertheless chooses to proceed with a rulemaking, we believe it is essential for the FRB to publish revised proposals responding to comments received during this comment period and provide another opportunity for public comment, including specific proposals for any changes to the model forms and clauses in the Regulations necessary to comply with the Proposed Rules.

A. Proposed Standard Would Be Costly and Burdensome

The FRB proposes to amend the Regulations (and their respective commentaries) by adding a definition of "clear and conspicuous" that is modeled after the Regulation P privacy provisions. The FRB also proposes to add several "examples" to the commentaries of the Regulations to demonstrate how institutions can meet this standard. Because privacy disclosures are generic and identical within a particular institution for individuals and most types of financial products and services, institutions can more easily apply the detailed format guidance to the privacy rules. This is vastly different from disclosures required under Regulation Z and the other Regulations. More specifically, financial institutions can provide substantially similar privacy notices, consisting of identical language and design format, to all individuals who obtain a financial product or service, regardless of the product or service obtained. For example, the same privacy disclosures usually are provided to both credit account and deposit account customers. In addition, most financial institutions use the same or substantially similar notices for all of their other customers; Regulation P privacy disclosures are generic in nature and do not vary from one individual to another, and most financial institutions use the same privacy notices for different financial products. Therefore, because privacy disclosures under Regulation P are not transaction-specific and do not vary among individuals, the "clear and conspicuous'' standard of Regulation P can be implemented without imposing substantial, additional ongoing burdens and costs on financial institutions.

In contrast, the disclosures under the Regulations often will vary among consumers, even if they have the same financial product, and almost always will vary among the different types of financial products offered. For example, many institutions offer numerous types of credit cards with different applicable disclosure forms, and each would have to be reviewed in connection with the new proposed standard. Furthermore, disclosures under the Regulations vary greatly for different financial products resulting in the need to create and review disclosures for credit card accounts, mortgage loans, home equity lines of credit, and other consumer loan products. The review process for the broad range of credit products would be vastly more complex and costly under the Regulations than for privacy disclosures under Regulation P.

In addition, disclosures made under Regulation Z will vary among consumers depending on account usage. For example, two consumers with the same type of credit card may use those cards for different purposes, such as for cash advances and balance transfers, and some may use their cards frequently, while others may use their cards seldomly; thus, periodic statement disclosures for those consumers will vary substantially. As a result, because the number of transactions and, therefore, the number of line items can vary with each periodic statement, credit card issuers would have to ensure that each and every periodic statement complies with the format "examples" in the proposed standard. Moreover, Regulation Z periodic statement disclosures may include more than a dozen disclosures, many of which can vary widely from individual to individual, depending on specific transactions, payments, and other account activity.[2] Therefore, application of the proposed standard under these circumstances would significantly increase costs for financial institutions due to the variety and complexity of the disclosures provided under the Regulations.

B. Proposed Standard Would Create Significant Civil Liability Risks

Visa believes that the proposed standard is an inappropriate disclosure model for the Regulations because it would significantly increase the civil liability risk of financial institutions. In this regard, if a financial institution fails to correctly apply the "clear and conspicuous" disclosure standard under Regulation P, an individual cannot bring a private action under that Regulation. On the other hand, if a financial institution fails to coniply with the "clear and conspicuous" standard under one of the Regulations, it can be held strictly liable for doing so. As a result, financial institutions would be exposed to a significant risk of liability and could be required to pay "statutory damages" and attorney's fees even if the disclosures themselves are completely accurate, even if the consumer is not harmed, and even if the consumer does not detrimentally rely on the disclosures. In addition, violation of the Regulations can give rise to liability under state unfair and deceptive statutes throughout the country — a fact that is obvious from the many lawsuits brought under the Regulations. As a result, the risks and consequences of failing to comply with the format requirements are dramatically different under Regulation P and the Regulations.

Visa also believes that the "examples" contained in the Proposed Rules of what constitutes "reasonably understandable" and "designed to call attention to" the disclosures would create significantly greater civil liability risk for financial institutions. In particular, because these examples are used in conjunction with repeated use of the term "whenever possible," which, at best, is uncertain, financial institutions will inevitably experience increased litigation until courts have defined these terms.

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[2] Required open-end disclosures on periodic statements may include (1) previous balance, (2) identification of transactions, (3) credits, (4) payments. (5) periodic rates and corresponding annual percentage rates ("APRs"), (6) balance on which finance charge is computed, (7) amount of finance charge, (8) historical APRs, (9) other charges, (10) closing date, (11) new balance, (12) free-ride period, and (13) billing error notice address. 12 C.F.R. §§ 226.7, 226.8.

C. Proposed "Clear and Conspicuous" Standard is Vague and Unworkable

Visa also believes that the proposed "clear and conspicuous" disclosure standard is vague and unworkable and fails to provide the clear guidance that financial institutions need in order to be able to comply with its format requirements.

1. Proposed Standard is Unworkable in Light of the Variety of Information Provided

Privacy disclosures under Regulation P are generally unrelated to other disclosures and contractual provisions and are typically presented as a stand-alone document, even when the privacy disclosures are provided with other account or loan-related information. In particular, aside from the Fair Credit Reporting Act affiliate sharing opt-out notice, there is generally no reason or need for institutions to actually integrate privacy disclosures with other information provided to consumers. On the other hand, disclosures under the Regulations, and particularly open-end credit disclosures under Regulation Z, are usually integrated with other logically related account information, such as state disclosures, contractual provisions, and explanatory information, to better enable consumers to understand how a credit plan operates. Similarly, Regulation E disclosures are frequently provided with other deposit account disclosures, explanatory information, and contractual provisions. However, the proposed disclosure standard would require disclosures to be "designed to call attention to the nature and significance of [their] information," and the disclosures would have to be distinguished or segregated from other related information.[3]

Thus, the application of the proposed standard fails to take into account the fact that, for example, Regulations Z and E disclosures are integral to other important information provided about the credit plan or the asset account and would fail to provide the flexibility needed for creditors to provide and explain the required disclosures. Therefore, if creditors are forced to physically segregate required disclosures from other related material in order to satisfy the "designed to call attention to" provision of the proposed standard, Visa believes that it would likely result in decreased consumer understanding and that it would impede the flow, continuity, and readability of affected documents.

For example, under section 226.6 of Regulation Z, creditors are required to disclose the circumstances under which finance charges and "other" charges will be imposed on an account. However, in order to ensure that consumers are aware of all account-related charges, creditors often disclose, along with the finance charge and "other" charges required by Regulation Z, the other fees, such as the fee for submitting a payment by check that is later returned unpaid, and fees for services, such as to expedite delivery of a payment or of a replacement credit card. To ensure compliance, the proposed disclosure standard would lead creditors to segregate the required disclosures, such as the finance charge and "other" charges, from the disclosure of non-required charges, resulting in a reduction in the overall clarity and understandability of the cardholder agreement to consumers. As a result, we believe that it would be extremely difficult, costly, and burdensome for financial institutions to adopt this standard for the Regulations and that the

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[3] 68 Fed Reg 68.786, 68,788 (Dec 10, 2003); 68 Fed Reg 68,788, 68,790 (Dec 10, 2003); 68 Fed Reg 68,793 68,797 (Dec 10, 2003)

artificial segregation of disclosures from necessarily related inforination is likely to mislead or confuse consumers.

2. Proposed Examples are Unclear

The examples provided in the Proposed Rules, which are niodeled after the examples in Regulation P and purport to illustrate how to comply with the proposed "clear and conspicuous" standard, are at best unclear. In fact, in the supplemental information accompanying Regulation P's final rule, the FRB expressly recognized that "many of tlie [clear and conspicuous] examples" provided in Regulation P are imprecise.[4] This imprecision will prevent institutions from safely designing their disclosure documents to comply with the proposed format requirements. As a result. credit card issuers and other creditors will face significant liability risks in trying to interpret how they can comply with the new format rules, and courts will undoubtedly construe the "examples" in ways that result in perceived violations and, thus, unfair liability for financial institutions.

For instance, one proposed example instructs creditors to "[a]void legal and highly technical business terminology" when making disclosures.[5] Nonetheless, several disclosures under the Regulations require the use of specific phrasing or involve highly technical terminology that must be used to make the disclosures. For example, the terms "annual percentage rate" and "finance charge" must be used under Regulation Z.[6] Similarly, Regulation Z provides that creditors must disclose the method used to determine the balance on which the finance charge may be computed in conjunction with the initial disclosures provided to consumers.[7] Moreover, the Official Staff Commentary to Regulation Z provides that a shorthand description of this disclosure, such as "previous-balance method," would not be sufficient.' Yet, use of the model clauses in Appendix G to describe the balance computation method would appear to use highly technical terminology and, thus, it is not clear whether the use of such wording would comply with the proposed standard.

As a further illustration of the unworkable nature of the proposed standard, financial institutions are instructed to provide wide margins and ainple spacing for all disclosures.' However, periodic statements have limited available space. Simply stated, financial institutions cannot provide wide margins and ample spacing on periodic statements without making far-reaching, fundamental, costly changes to those periodic statements and to the costly processing equipment used to prepare the statements. Similarly, institutions must provide information on receipts at electronic terminals under Regulation E.[10] Providing wide margins and ample spacing on these receipts is not possible unless electronic terminals are dramatically changed, and such changes would impose astronomical costs on financial institutions.

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[4] 65 Fed. Reg. 35,162, 35,165 (June 1, 2000).
[5] 68 Fed. Reg. 68,793, 68,797 (Dec. 10, 2003).
[6] 12 C.F.R. §§ 226.7(f), 226.7(g).
[7] 12 C.F.R. § 226.5a(b)(6).
[8] 12 C.F.R. pt. 226, Supp. I, § 226.6(a)(3)-1.
[9] 68 Fed. Reg. 68,793, 68,797 (Dec. 10, 2003).
[10] 12 C.F.R. § 205.9.

In addition, Visa believes that the requirement that disclosures be designed "to call attention to the nature and significance of the information" is unworkable in conjunction with the Regulation Z requirement regarding mandated terminology, such as with the terms "annual percentage rate" and "finance charge."[11] Under Regulation Z, these terms must be more conspicuous than all other terms required to be disclosed and, thus, it would be difficult, if not impossible, for financial institutions to harmonize these competing disclosure standards.[12]

Visa also believes that the examples provided in the Proposed Rules, which purport to offer guidance in complying with the proposed disclosure standard, are fraught with risk and are unworkable in conjunction with the Regulations. While ostensibly the proposed examples should be treated as "examples," Visa believes that courts will ultimately interpret these examples as requirements in determining whether an institution's disclosures satisfy the "clear and conspicuous" standard. Furthermore, given the wording of many of the examples, such as "definite, concrete, everyday words," or "avoid[ing] legal and highly technical business terminology whenever possible," it will be difficult, if not impossible, for financial institutions to determine if they are in compliance with the proposed standard, and how many of the proposed examples have to be satisfied before compliance is assured."

3. The Proposed Standard Does Not Adequately Define "Disclosure"

Visa believes the proposed standard is unclear regarding the meaning and scope of the very term "disclosure," thereby preventing financial institutions from predicting, with any certainty, what information is subject to the proposed "clear and conspicuous" standard. In this regard, it is unclear whether the proposed standard would apply to all information required to be given to a consumer under one of the Regulations. For example, it is unclear under the Proposed Rules whether the proposed standard would apply to Regulation Z billing error resolution notices sent to consumers. Although we assume not, this is not clear from the Proposed Rules, and if billing error resolution notices are deemed subject to the proposed standard, it would represent a significant departure from the current standard under the Regulations, which does not apply the "clear and conspicuous" standard to such information.

Similarly, Visa strongly opposes the proposed deletion of guidance in Regulation Z dealing with providing "Schumer Box" disclosures by use of electronic communication.[14] This provision has provided helpful guidance to credit card issuers in complying with Regulation Z and the proposed removal of this information can only create uncertainty about how Regulation Z applies to section 226.5a—disclosures provided electronically.

4. Proposed Standard is Contrary to the Truth in Lending Act

In addition to the problems discussed above, Visa believes that use of the Regulation P "clear and conspicuous" standard is contrary to the Truth in Lending Act ("TILA") itself. In this regard, we believe that the provision in the Proposed Rules stating that "the presence of this other

[11] 68 Fed Reg 68,793, 68,797 (Dec 10,2003)
[12] 12 C F R § 226 5(a)(2)
[13] 68 Fed Reg 68,793, 68,797 (Dec 10,2003)
[14] 68 Fed Reg 68,793, 68,794 (Dec 10,2003)

information may be a factor in determining whether the 'clear and conspicuous' standard is [satisfied]," is contrary to the provisions of TILA governing the format for open-end disclosures." In particular, TILA expressly states that a creditor "may supply additional information or explanation with any disclosures required" to be provided.[16]

Moreover, not only is the Regulation P standard of the Proposed Rules contrary to TILA, it also contradicts one of the primary purposes of the Truth in Lending Simplification Act ("TILSA").[17] More specifically, one of the principal goals of TILSA was to narrow a creditor's liability for violations of TILA.[18] In this regard, the Senate Report on TILSA states that a "creditor's liability would also be reduced in open-end (revolving charge) transactions [and that] no statutory penalties would attach to less important requirements such as type size, the sequence of disclosures, and identification of purchases and payments."[19] Adoption of the Regulation P standard would create liability for creditors that provide other information with the Regulation Z disclosures, contrary to TILSA's goal of reducing the liability exposure of creditors. In essence, the only certain way to comply with the proposed standard would be for a creditor to segregate all disclosures in an open-end credit transaction — an approach that would be contrary to the format provisions in TILA. In addition to creating liability exposure for creditors for failing to properly segregate disclosures, the artificially forced segregation also exposes creditors to unfair and deceptive practices liability under section 5 of the Federal Trade Commission Act and corresponding state laws by forcing them to separately present fees that may be incurred by consumers in connection with the same account and perhaps even in connection with the same transaction.

5. Impact of Recent Court Cases

Visa believes that the proposed standard, when combined with recent judicial decisions like the Third Circuit's decisions in *Rossmirn v. Fleet*[20] and *Roberts v. Fleet,*[21] will prove disastrous for creditors seeking to comply with Regulation Z.

Visa believes that the vague standards under the Proposed Rules concerning when disclosures are "clear and conspicuous," together with the unclear examples included in the Proposcd Rules, will encourage even more plaintiffs to bring lawsuits against financial institutions under the Regulations. Visa also believes that courts, like the Third Circuit. may be amenable to interpreting the proposed new standards in ways creditors cannot predict. For example, a court could interpret the guidance that "the presence of this other information may be a factor in determining whether the 'clear and conspicuous' standard is [satisfied]" in a way that would make it impossible for financial institutions to determine what, if any, information could be added to

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[15] 68 Fed. Reg. 68,793, 68,797 (Dec. 10, 2003).
[16] 15 U.S.C. § 1632(b).
[17] Pub. L. No. 96-221, title VI, 94 Stat. 132, 168-186 (1980) (codified as amended in scattered sections of 15 U.S.C §§ 1601-1667e).
[18] S. Rep. No. 96-368, at 32-33, 1980 U.S.C.C.A.N., Vol. 2, 236, 267 and 285.
[19] *Id.* at 285.
[20] *Rossman v. Fleet Bank Nat 'l Ass 'n*, 280 F.3d 384 (3d Cis. 2002).
[21] *Roberts v. Fleet Bank Nat'l Ass 'n*, 342 F.3d 260 (3d Cir. 2003).

explain the disclosures provided under the Regulations.[22] Thus, the Third Circuit's decisions, when coupled with the vagueness and unworkability of the proposed "clear and conspicuous'' standard, are likely to lead courts to define "clear and conspicuous" in ways financial institutions cannot predict — resulting in liability for financial institutions.

Furthermore, Visa believes the Third Circuit's decisions, when taken in conjunction with the guidance in the Proposed Rules that "the presence of other information may be a factor in determining whether the 'clear and conspicuous' standard is [satisfied]," potentially incorporates principles of unfair and deceptive practices issues under both federal and state law into the proposed "clear and conspicuous" standard. Visa believes that such an approach is fraught with risk and contrary to the goals of TILA. In fact, the increased risk of additional litigation and potential liability under the Proposed Rules is so great that the Proposed Rules likely could be inconsistent with ongoing federal court reform efforts.

6. Adoption of the Standard Would Conflict with Recent Proposed Rulemaking

Visa believes the proposed use of the Regulation P "clear and conspicuous'' standard and the corresponding compliance "examples" is inappropriate at this juncture. The proposed use of the Regulation P model is inappropriate in light of the fact that the FRB and the other federal banking agencies, as well as the Federal Trade Commission, the Commodity Futures Trading Commission, and the Securities and Exchange Cornmission (collectively, the "Agencies") recently published an advance notice of proposed rulemaking ("ANPR') requesting public comment on ways to improve the privacy notices provided to consumers by financial institutions." In particular, in the ANPR, the Agencies expressly state that they are considering amendments to the privacy rule "to provide for privacy notices that are more understandable and useful to consumers."[24] Furthermore, the Agencies are seeking comment on "issues associated with the format, elements, and language used in privacy notices."[25] Thus, Visa believes that in light of the fact that the Agencies are currently considering changes to the format of the privacy notices, it would be premature and inappropriate for the FRB to apply these same Regulation P "clear and conspicuous" standard and "examples" to the Regulations.

II. Debt Cancellation Contracts and Debt Suspension Agreements under Regulation Z

The FRB also has solicited comment regarding debt cancellation contracts ("DCC") and debt suspension agreements ("DSA").[26] In particular, the FRB has inquired whether additional guidance is needed for alternative types of credit protection programs in addition to DCCs. In addition. the FRR has asked whether fees for DSAs should be included in the definition of a finance charge under Regulation Z and whether section 226.9(f) of Regulation Z should be interpreted or amended to address DCCs and/or DSAs. As discussed below, Visa believes that fees for DSAs should be excluded from the finance charge and that section 226.9(f) should not be interpreted or amended to include either DCCs or DSAs.

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[22] 68 Fed Keg 68.703. 68.797 (Dec 10.2003)
[23] 68 Fed Keg 75,164 (Dec 30.2003)
[24] 68 Fed Keg 75.164, 75,166 (Dec 30, 2003)
[25] *Id.*
[26] 68 Fed Reg 68,707, 68,795 (Dec 10, 2003)

First, with regard to the definition of finance charge, section 226.4(b)(10) of Regulation Z currently provides that fees for DCCs written in connection with a credit transaction are to be included in the finance charge. However, section 226.4(d)(3) of Regulation Z also provides that fees for a DCC may be excluded from the finance charge if certain disclosures are made and the consumer affirmatively elects the DCC. Conversely, DSAs are not specifically referred to in sections 226.4(b)(10) or 226.4(d)(3). Visa believes that because DSAs and DCCs are both credit insurance substitutes that allow for the cancellation or suspension of consumer payments upon a triggering event, DSAs should be treated the same as DCCs and therefore should be similarly excluded from the finance charge under Regulation Z. More specifically, because of the similarities in how these products function, fees for DSAs, like fees for DCCs, should be excluded from the finance charge upon the provision of the disclosures similar to those in section 226.4(d)(3) and consumer election to accept a DSA.

Second, tlie FRB asks whether section 226.9(f) should be interpreted or amended to include DSAs or DCCs. Under section 226.9(f), a creditor must notify a consumer prior to changing the provider of the consumer's insurance plan for the repayment of all or part of the outstanding balance on an open-end credit account. Because the triggering event for section 226.9(f) is a change in an unrelated third-party insurance provider initiated by the card issuer, Visa believes the FRB should not amend this provision to apply to DCCs or DSAs. The primary concern underlying the notice required by section 226.9(f) is the prompt notification of consumers upon a change of third-party insurance providers. We believe the purposes which led Congress to require a notice if a third-party insurer is changed by a creditor simply are not present if a creditor converts credit insurance products to DCCs or DSAs. Thus, there is no reason for the FRB to expand the scope of section 226.9(f) to include DCCs and/or DSAs.

111. Regulatory Burden Associated with Clear and Conspicuous Proposals

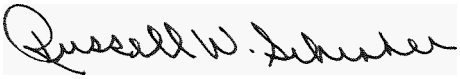
Finally, the FRB has solicited comment on the accuracy of the estimated burden associated with complying with the disclosure and record keeping requirements in connection with providing financial institutions with a more uniform definition of "clear and conspicuous." While Visa appreciates the difficulty of deriving accurate figures to estimate the costs of complying with the disclosure and record keeping requirements imposed by the Proposed Rules, we believe the FRB's estiniate that no increase in burden will accompany the proposed standard is simply not an accurate reflection of the costs associated with compliance. Furthermore, Visa believes that the Proposed Rules will have a significant impact on small entities, including small banks.

While Visa does not have precise data, we believe that the cost of complying with the Proposed Rules would be substantial. For example, as discussed above, it would be necessary to incur disclosure design costs (*e.g.*, segregating disclosures, the use of stand-alone documents, etc.) in order to comply with the proposed "clear and conspicuous" standard. Furthermore, because disclosures under the Regulations can differ among financial products, as well as aniong consumers for identical products, compliance with the proposed "clear and conspicuous" standard would require the training of individuals to review disclosures and solicitations as a whole and on an individual basis to guarantee proper compliance. Given these considerations, it simply is not possible for the cost burden associated with the proposed standard to remain unchanged. In fact, it

is likely that the compliance costs resulting from the Proposed Rules will far exceed the enormous costs incurred by financial institutions in their efforts to comply with Regulation P.

Once again, we appreciate the opportunity to comment on this important matter. If you have any questions concerning these comments or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me at (415) 932-2178.

Sincerely,



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